STATE OF MICHIGAN

COURT OF APPEALS

WARREN EDUCATION ASSOCIATION and JAMES R. FOUTS, Charging Parties-Appellants, v WARREN CONSOLIDATED SCHOOLS, Respondent-Appellee.	UNPUBLISHED April 12, 2007 No. 265643 MERC LC No. 01-000136

Before: Owens, P.J., and Neff and White, JJ.

PER CURIAM.

Charging parties appeal as of right the decision and order of the Michigan Employment Relations Commission (MERC), dismissing the unfair labor practice charge against respondent. We reverse.

Charging parties contend that MERC impermissibly ignored and failed to defer to the Administrative Law Judge's (ALJ) assessment of witness credibility, thus leading it to reject the ALJ's finding of anti-union animus, and that MERC's decision is contrary to competent, material, and substantial evidence on the whole record. We agree.

The Commission concluded that the ALJ's findings of anti-union animus and retaliation were not supported by the evidence:

> The ALJ based his finding of anti-union animus primarily on the timing of Respondent's actions in relation to the filing of the grievance and grievance meetings. However, the record indicates that the timing of these events was for the most part dictated by the convenience and schedules of the parties. Although the ALJ inferred animus from the delay in investigating and issuing the reprimand, Respondent gave a reasonable explanation for the delay. Walsh explained that it was not until the day of the school board meeting regarding Fouts' grievance that Walsh learned from Green that these might not have been isolated remarks, which made it a more serious matter. The Employer's investigation was conducted in order to determine whether Fouts had any basis for his comments. By questioning Fouts at the Step 2 grievance meeting, Respondent intertwined its underlying investigation with the grievance. While this may have been administratively convenient, it was clearly not the most prudent course of

> action. However, we conclude that this coincidence in timing is insufficient evidence upon which to base a finding of illegal motivation in the absence of any other indication of anti-union animus. There is no direct evidence of any hostility towards Fouts or other employees based on their use of the grievance procedure. *Ingham Co Bd of Comm*, 2000 MERC Lab Op 50. Establishing a violation of PERA requires more than mere suspicion; substantial evidence of anti-union animus must be shown. *Michigan Employment Relations Comm v Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *Rochester Sch Dist*, 2000 MERC Lab Op 38, 42.
>
> We have carefully considered each of the arguments set forth by Charging Parties and find that they do not warrant a change in the result. . . .

MERC's factual findings are final if supported by "competent, material, and substantial evidence on the record considered as a whole." *MERC v Detroit Symphony Orchestra*, 393 Mich 116, 121; 223 NW2d 283 (1974), citing MCL 423.23(e) and Const 1963, art 6, § 28. The "substantial evidence" standard encompasses

> a thorough judicial review of [the] administrative decision, a review which considers the whole record—that is, both sides of the record—not just those portions of the record supporting the finding of the administrative agency. Although such a review does not attain the status of *de novo* review, it necessarily entails a degree of qualitative and quantitative evaluation of evidence considered by an agency. Such review must be undertaken with considerable sensitivity in order that the courts accord due deference to administrative expertise and not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views. Cognizant of these concerns, the courts must walk the tightrope of duty which requires judges to provide the prescribed meaningful review. [*Detroit Symphony Orchestra, supra* at 124.]

The charging party has the burden of showing that the protected conduct (here, Fouts's filing of a grievance) was a motivating or substantial factor in the employer's decision (here, to reprimand Fouts). *Schoolcraft College Ass'n of Office Personnel, MESPA v Schoolcraft Community College*, 156 Mich App 754, 763; 401 NW2d 915 (1986). Once that burden is met, the burden shifts to the employer to demonstrate that it would have performed the same action even in the absence of the protected conduct. *Id.*

We agree with Charging Parties that MERC disregarded the ALJ's assessment that Judith Locher's testimony regarding events leading to the issuance of the reprimand to Fouts was to be credited and David Walsh's discredited. It is clear from MERC's decision and order reversing the ALJ that it credited Walsh's testimony. See decision, quoted *supra*, which states that "Respondent gave a reasonable explanation for the delay," and then summarizes only Walsh's testimony.

In a case such as this, where discriminatory motivation is a key issue, credibility determinations of the decision-maker who hears and observes the witnesses first hand are critical. *Detroit Symphony Orchestra, supra* at 124-125. We conclude that the Commission

improperly substituted its own credibility determinations for those of the ALJ. *Id.* at 126. Relatedly, we also conclude that the Commission miscast Charging Parties' case (and the ALJ's finding of anti-union animus) as based "primarily on the timing of Respondent's actions in relation to the filing of the grievance and grievance meetings." A close reading of the ALJ's detailed and methodical decision and recommended order evidences that "timing" was a factor underlying his determination, but certainly not the only important factor. Further, the issue of timing as found pertinent by the ALJ had several aspects and manifestations at different times throughout the proceedings below, not simply the events addressed by the Commission, which stated that "we conclude that this coincidence in timing [referring to Fouts being questioned by Respondent's attorney at the Step 2 meeting on *Fouts's* own grievance] is insufficient evidence upon which to base a finding of illegal motivation in the absence of any other indication of anti-union animus." The Commission addressed only this "coincidence" regarding Fouts' Step 2 meeting because it had credited Walsh's explanation for the delay in investigating Fouts and issuing the reprimand. See Commission's decision, quoted *supra*.

The ALJ's decision and recommended order stated in pertinent part:

> The parties agree that Fouts engaged in protected activity by filing a grievance and Respondent was aware of that activity. Respondent contends, however, that the Charging Parties cannot establish a prima facie case of adverse action motivated by union animus because they cannot show that Respondent was hostile to Fouts' protected activity. I disagree.
>
> I infer union animus from the suspicious timing of Respondent's alleged decision to investigate statements made by Fouts, the irregularity in the investigation, the four-month delay in disciplining Fouts and its timing. I find suspect Respondent's claim that on March 21, a week after the grievance was filed and only moments before the board's discussion of whether to defend the grievance, it suddenly decided to investigate a statement Fouts made six weeks earlier based on a hearsay statement by Green, the board president, whose conduct was the subject of the grievance. Moreover, Green, in his February 12 letter to Fouts demanding an apology and retraction makes no reference to any prior statements that Fouts allegedly made about him or his family before February 9.
>
> I also infer union animus from Respondent's failure to follow its usual practice of verbally notifying teachers of pending investigations or informing them of their right to union representation. Moreover, contrary to Walsh's testimony that it was "a matter of time" between March 21 and May 3 when the parties could actually get a meeting together to address the matter, the Union received no information that the Step II hearing would involve an investigation of Fouts. Jouppi, Respondent's own witness, even testified that he could not recall another case when a Step II hearing was used to investigate a grievant.
>
> Finally, Respondent's choice of June 4, the date of Fouts' Step III grievance meeting, as the occasion to deliver a written reprimand to him is compelling and persuasive evidence of Respondent's hostility to Charging Parties' pursuit of a grievance on Fouts' behalf. Respondent would have this tribunal believe that the reprimand was issued close in time to the Step III grievance hearing as a matter of

convenience and consideration of the parties' schedules, not union animus, and that it was imposed at a wholly separate meeting with different individuals.

I find nothing in the record to show that the Union was placed on notice that Fouts would be disciplined during the Step III hearing or that scheduling a time to discipline Fouts was even an issue. Locher testified credibly that when she arrived at the hearing Walsh told her that Respondent was considering reprimanding Fouts before the grievance hearing started. But for Locher's insistence that Fouts be reprimanded after the grievance hearing, it is reasonable to believe that Respondent would have reprimanded Fouts, as Walsh told Locher, "before the grievance hearing starts," not at a separate meeting or by different individuals. Since Respondent's initial plan was to give Fouts a letter of reprimand as soon as he arrived, I discredit Walsh's testimony that Hancock [Respondent's attorney] and Jouppi, who were among those present when Locher arrived, were there only for the grievance meeting. This is especially true since Jouppi had been directed to investigate Fouts, and Hancock interrogated Fouts during the Step II hearing.

I find that Respondent's claim that Fouts was reprimanded for violating Board Policy 3310 on Freedom of Speech in Non-Instructional Setting after a complete and thorough investigation is a pretext designed to mask its improper motivation. It is noteworthy that on February 13, 2001, a few days after the incident in the superintendent's office [which was the subject of Fouts's grievance against Green, the Board President], Respondent had deemed the matter unworthy of further attention. Dr. Clor rejected the Union's attempt to informally address the matter by telling Locher, "just drop it, why don't -- you know, you drop it, I'll drop it and just let the two of them [Fouts and Green] battle it out." I have difficulty believing that it was not until March 21, a week after a grievance was filed, that Respondent suddenly realized that Fouts' statement on February 9 might have violated Board Policy 3310. Walsh acknowledged that Green's violent tirade and his use of profane language toward Fouts was inappropriate for the board president. However, Walsh never reminded Green of Board Policy 3310 that prohibits the use of abusive or personally defamatory comments. Although board members are not employee, it is reasonable to expect that the policy on free speech would also govern their conduct.

Moreover, there is nothing on the record to show that Respondent conducted a complete and thorough investigation. Although Walsh claimed he asked Jouppi to conduct an investigation, Jouppi testified that he did not. The record only shows that Respondent's attorney questioned Fouts during the Step II grievance hearing about whether he had any evidence that Green used steroids and cocaine. The answer that he solicited was no different that what Dr. Clor and Walsh already knew—that Fouts was repeating a statement that was made to him by a third party. On the other hand, no investigation was conducted to ascertain the veracity of Green's alleged hearsay statement that Fouts made comments to other people in the organization about his [Green's] alleged drug use, or to determine whether Fouts' allegations about Green were true.

> I find that the letter of discipline issued to Fouts on June 4 was motivated by union animus and was intended to have a chilling effect on Fouts' exercise of his right to file a grievance, and to retaliate against him. But for the grievance filed on March 13, 2001, I find it unlikely that the statements made by Fouts on February 9, would have warranted a written reprimand on June 4, 2001, four months later. I conclude that Respondent reprimanded Fouts because of his protected activity in violation of Section (10)(1)(a) and (c) of PERA.

The Commission improperly disregarded the ALJ's determination that Walsh's testimony was to be discredited and Locher's credited, and from there took a narrow view of the Charging Parties' allegations, as involving little more than timing. This was a miscasting of Charging Parties' case. We agree with the ALJ that Charging Parties established a prima facie case of discrimination. We also conclude that ample record evidence supported that Fouts would not have been reprimanded absent his protected conduct, i.e., his pursuit of a grievance against Green, the School Board President. We have read the cold record and conclude that the ALJ's credibility findings and thorough analysis flowing therefrom, quoted *supra*, set forth much more plausible findings than did the Commission. In *Detroit Symphony Orchestra, supra* at 126-127, the Supreme Court reversed the Commission's finding of anti-union animus in favor of the ALJ's finding to the contrary, noting:

> While the hearing examiner's analysis is based upon permissible inference from record evidence, the above statements of the Board are nothing but convoluted conjecture tantamount to speculation. As such, they do not support a finding of anti-union animus.
>
> Beyond this, the Appeal Board finding of anti-union animus rests solely upon the Board's interpretation of certain conversations between plaintiff Chase and Sixten Ehrling, the conductor of the orchestra, who was instrumental in the Symphony's ultimate decision to employ another trombonist. The trial examiner and Board's differing views as to the "credibility" of the witnesses explain the divergence in their ultimate conclusions.
>
> Our reading of the cold record indicates that the finding of the trial examiner is more plausible than the finding of the Board. Given this reading, are we to ignore the determination as to credibility of the only decision-maker to hear testimony firsthand and, in effect, credit the contrary determination of the Board? We think not. The findings of the trial examiner are a part of the record we are entitled to consider in exercising our review power . . . .
>
> * * *
>
> Ascribing due weight to the unique opportunity of the trial examiner to weigh the testimony of the witnesses, our reading of the cold record is confirmed. We conclude that the critical finding of the MERC Board is not supported by "substantial evidence."

We conclude, as did the *Detroit Symphony Orchestra* Court, *id.*, that the Commission improperly disregarded the ALJ's determination to credit Locher's testimony and discredit

Walsh's, that this disregard led the Commission to take an overly narrow view of charging parties' case, and led to its ultimate conclusion that the record did not support that Fouts was reprimanded for engaging in protected conduct. The Commission's conclusion to that effect is not supported by substantial evidence.

Reversed. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Helene N. White